

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

05/30/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000753

FILED: \_\_\_\_\_

STATE OF ARIZONA

KEVIN D SOLIE

v.

JOHN I EMERSON

THOMAS J PHALEN

FINANCIAL SERVICES-CCC  
PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. 8708121

Charge: ILLEGAL DUMPING

DOB: 01/06/69

DOC: 10/10/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the date of oral argument: May 1, 2002. This decision is made within 30

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days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, the memoranda and arguments submitted by counsel.

Appellant, John I. Emerson, was charged with violating Phoenix City Code Section 27-7(a), Illegal Dumping on October 10, 2000. At the conclusion of Appellant's trial, the trial court took the matter under advisement and found Appellant guilty on June 19, 2001. Appellant has filed a timely Notice of Appeal in this case.

The first issue raised by Appellant is that the trial court lacked jurisdiction and erred in denying Appellant's Motion to Dismiss. Appellant argues that the acts complained of in the complaint (and testified about during his trial) were committed by Appellant's corporation, Dynamite Organics, LLC. Appellant argues that the corporation was responsible for any violation of the Phoenix City Code, not Appellant. However, as Appellee has pointed out in its memorandum, A.R.S. Section 13-306 provides for criminal liability to individuals acting on behalf of an enterprise or corporation. A.R.S. Section 13-306 provides:

A person is criminally liable for conduct constituting an offense which the person performs or causes to be performed in the name of or in behalf of an enterprise to the same extent as if such conduct were performed in such person's own name or behalf.

Though enterprises or corporations may be criminally responsible pursuant to A.R.S. Section 13-305, that corporate liability does not preclude criminal liability for Appellant acting as an individual performing the acts described in A.R.S. Section 13-306. This Court concludes that the trial judge did not err in denying Appellant's Motion to Dismiss. Clearly, the trial court had jurisdiction over Appellant as an individual.

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Next, Appellant argues that the trial judge erred in finding him guilty, and that he is not guilty of the crime charged. Appellant's argument concerns the sufficiency of the evidence to warrant his conviction. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.<sup>1</sup> All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.<sup>2</sup> If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.<sup>3</sup> An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.<sup>4</sup> When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.<sup>5</sup> The Arizona Supreme Court has explained in State v. Tison<sup>6</sup> that "substantial evidence" means:

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<sup>1</sup> State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

<sup>2</sup> State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

<sup>3</sup> State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

<sup>4</sup> In re: Estate of Shumway, 197 Ariz. 57, 3 P.3<sup>rd</sup> 977, review granted in part, opinion vacated in part 9 P.3<sup>rd</sup> 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

<sup>5</sup> Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

<sup>6</sup> SUPRA.

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More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.<sup>7</sup>

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

Appellant also argues that the trial judge violated his right to be present at a critical stage of the proceedings by entering a verdict without Appellant being present. The record reflects that at the conclusion of the trial on June 12, 2001, that the trial judge informed the parties of his intentions as follows:

I'm going to take this under advisement until the 19<sup>th</sup> of June at 8:30 in the morning. No one needs to be present. You can call in. If Mr. Emerson is found not guilty, he will be discharged, and his bond will be exonerated. If he is found guilty, the matter will be set for a sentencing at a later date.<sup>8</sup>

The record also reflects that counsel for Appellant said, "okay."<sup>9</sup>

The record further reflects that on June 19, 2001, the trial court found Appellant guilty. Contrary to Appellant's assertions, Appellant did have notice of the time when the trial judge would render his verdict. Appellant was given the

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<sup>7</sup> Id. At 553, 633 P.2d at 362.

<sup>8</sup> R.T. of June 12, 2001, at page 112.

<sup>9</sup> Id.

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opportunity to be present and also the opportunity to waive his presence. From counsel's statement agreeing to the procedure proposed by the trial judge and the non-appearance of Appellant and counsel on June 19, 2001, it is clear that Appellant has waived his right to be present when the verdict was announced.

At sentencing the trial court reserved jurisdiction over the issue of restitution. The trial court did not enter any restitution order, except that restitution would be capped as a maximum at \$39,410.00. Appellant argues that the restitution order capping the possible restitution amount must be vacated. Appellant argues that the costs of removing the materials that were illegally dumped is not a "cost directly caused by the criminal conduct in question."<sup>10</sup> Appellant's arguments that any restitution order must be vacated are without merit. The trial court has yet to enter a restitution order.

This Court is aware that the parties and the trial court had postponed the issue of restitution until the Arizona Supreme Court resolved the issues presented to it by a Petition for Review in State v. Wilkinson<sup>11</sup>. Counsel appear to agree that restitution may be awarded to a victim only for damages that result directly from the criminal conduct in question. Therefore, this Court will remand this case back to the trial court for a restitution hearing in conformity with the guidelines established by State v. Wilkinson.<sup>12</sup>

IT IS ORDERED affirming the conviction, judgment of guilt and sentence imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case, including a restitution hearing.

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<sup>10</sup> Appellant's notice of supplemental authority at page 2.

<sup>11</sup> 202 Ariz. 27, 39 P.3d 1131 (2002).

<sup>12</sup> Id.